

Final Report
Full investigation - *Ombudsman Act 1972*

Complainant	Mayor Ray Agnew
Council member	Councillor Tania Stock
Council	Yorke Peninsula Council
Ombudsman reference	2018/04529
Date complaint received	24 April 2018
Issues	<ol style="list-style-type: none">1. Whether Cr Stock failed to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code of Conduct for Council Members by failing to comply with a recommendation of the Local Government Association Governance Panel adopted by council on 14 February 20182. Whether Cr Stock breached clause 3.3 of Part 3 of the Code of Conduct for Council Members by raising a Question Without Notice regarding an allegation of 'harassment, intimidation and bullying' and a complaint to the Ombudsman thereby divulging confidential information

Jurisdiction

The complaint was lodged by Mayor Agnew and is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Mayor Agnew confirmed that he consented to be named as the complainant.¹

The complaint alleges a breach of Part 3 of the Code of Conduct for Council Members made pursuant to section 63 of the *Local Government Act 1999* (**the Code of Conduct**).² An act of a council member that may constitute grounds for complaint under the Local Government Act is taken to be an 'administrative act' for the purposes of the Ombudsman Act.³

¹ Email to my Office on 17 May 2018.

² The Code of Conduct was gazetted on 29 August 2013.

³ Section 263A(4) Local Government Act; section 3, Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from Cr Stock
- considering:
 - the Ombudsman Act
 - the *Local Government Act 1999*
 - the Code of Conduct
 - the council's *Process for Managing Complaints and Breaches under the Code of Conduct for Elected Members*
- providing Cr Stock and the complainant with my provisional report for comment
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.⁴ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...⁵

Response to my provisional report

On 10 July 2018 I provided my provisional report to the parties for comment.

Neither the complainant nor Cr Stock provided any response to my provisional report.

Accordingly, this report is in substantially the same terms as my provisional report.

Background

1. Councillor Tania Stock is a councillor for the Yorke Peninsula Council (**the council**).
2. In May 2017 a complaint was made to the complainant by Deputy Mayor Hoyle about what he believed to be a breach of Part 2 of the Code of Conduct by Cr Stock (**the complaint**).
3. The complaint was referred by the council to the Local Government Association Governance Panel (**the panel**). The panel referred the complaint to one of its panel members, EMA Legal, which finalised a report about the complaint on 5 February 2018 (**the EMA report**).

⁴ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

⁵ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

4. The EMA report found that Cr Stock had acted in breach of clause 2.2 of the Code of Conduct. The allegations that clauses 2.4, 2.5, 2.6 and 2.8 of the Code of Conduct had been breached were found not to be substantiated. The allegation of a breach of clause 2.9 of the Code of Conduct was found to be 'substantiated to the extent only that Cr Stock's comments were not representative of an endeavour to maintain a respectful relationship with all Councillors.'
5. The EMA report made the following recommendations:
 1. That Cr Stock be requested to make a written/verbal public apology for breach of 2.2 and 2.9 of the Behavioural Code in so far as she made comments expressing embarrassment in connection with Council - such apology to be made within 2 ordinary meetings of Council.
 2. Council otherwise resolve to take no action in respect of all other allegations.
 3. That Council note in the minutes of the relevant General Meeting at which the apology is given the lengthy passage of time that had elapsed since this complaint was first raised, together with:
 - The subsequent stress and strain experienced by both the complainant, the respondent, and their families, which both parties expressed to the Investigator.
 - The expenditure of time, effort and money by all parties which could, in respect of future similar complaints, be considered at an early stage for resolution by way of **external independent mediation** or **conciliation** by an appropriately qualified person.
 4. The Panel recommends to Council it instruct the administration to review its Complaint Management process / flowchart so as to make consideration of mediation or conciliation by an external independent person a regular step before referral of complaints between elected members to the Panel.
6. A redacted version of the EMA report was presented to the council at Agenda Item 21.1 of the Ordinary Council Meeting held on 14 February 2018. The title of the item was 'Code of Conduct for Council Members Complaint - Public'. The redacted report excluded the allegations where no breach had been found. A full version of the EMA report was presented to the council at Confidential Agenda Item 26.4 of the 14 February 2018 meeting.
7. The minutes for the council meeting on 14 February 2018 relevantly record:

21.1 CODE OF CONDUCT FOR COUNCIL MEMBERS COMPLAINT - PUBLIC

PURPOSE

To inform the Council of the outcome of an investigation undertaken by the Local Government Governance Panel (the Panel) in relation to an alleged breach of the Code of Conduct for Council Members made by Deputy Mayor Cr Scott Hoyle against Cr Tania Stock.

RESOLUTION

Moved: Cr John Rich
Seconded: Cr Jeffrey Cook

That Council:

1. receive the redacted public copy of the Local Government Association Governance Panel Final Report.

2. resolve to adopt the following recommendations made by the Panel, as set out within the Final Report:
 1. that Cr Stock be requested to make a written and verbal public apology for a breach of Clauses 2.2 and 2.9 of the mandatory Code of Conduct for Council Members, in so far as she made comments expressing embarrassment in connection with the Council, within two (2) ordinary meetings of the Council (that is prior to the ordinary Council meeting to be held at the Minlaton Council Chambers on 9 May 2018).
 2. that Council note in the minutes of the relevant ordinary Council at which the apology is given:
 - (i) the lengthy passage of time that has elapsed since this complaint was first raised;
 - (ii) the subsequent stress and strain experienced by both Deputy Mayor Cr Hoyle, and Cr Stock and their families, which both parties expressed to the investigator;
 - (iii) the expenditure of time, effort and money by all parties which could, in respect of future, similar complaints be considered at an early stage for resolution by way of external, independent mediation or conciliation by an appropriately qualified person.
 3. review its Process for Managing Complaints and Breaches under the Code of Conduct for Elected Members to make consideration of mediation or conciliation by an external, independent person a regular step before referral of complaints between Elected Members to the Panel.

CARRIED 026/2018 (14/02/2018)

8. The confidential minutes for the 14 February 2018 meeting relevantly record:

26.4 CODE OF CONDUCT FOR COUNCIL MEMBERS COMPLAINT

PURPOSE

To inform the Council of the outcome of an investigation undertaken by the Local Government Governance Panel (the Panel) in relation to alleged breaches of the Code of Conduct for Council Members made by Deputy Mayor Cr Scott Hoyle against Cr Tania Stock.

RESOLUTION

Moved: Cr Naomi Bittner
Seconded: Cr David Langford

That Council:

1. receive the Local Government Association Governance Panel Final Report.
2. resolve to take no action in respect of the allegations made by Deputy Mayor Cr Scott Hoyle against Cr Tania Stock relating to the allegations of breaches of clauses 2.4, 2.5, 2.6 and 2.8 of the Code of Conduct for Council Members.

CARRIED 061/2018 (14/02/2018)

9. On 22 March 2018 the complainant sent a letter to Cr Stock via email which stated, in part:

I write to formally advise you of the outcome of the investigation undertaken by the Local Government Governance Panel (the Panel) in relation to an alleged breach of the Code of Conduct for Council Members involving you.

...

I write to formally draw your attention to ... the requirement for you to make a written and verbal public apology prior to the ordinary Council meeting to be held on 9 May 2018.

I further advise you that failure to do so may result in a further breach of the Code of Conduct for Council Members, therefore I draw this matter to your earliest attention.

10. The complainant received a letter from Griffins Lawyers, on behalf of Cr Stock, on 23 March 2018 stating, in part:

... our client has no intention of apologising either in writing or verbally to the Council. Of the ten complaints made by Cr Hoyle nine were found to have not been substantiated and the one complaint that EMA Legal determined had been substantiated was of such a minor and trivial nature that there is simply no need or requirement for Cr Stock to make an apology at all.

We are deeply concerned as to the wording of your letter to Cr Stock which is nothing short of intimidatory and an attempt to bully Cr Stock into making an apology at all.

...

You assert that Cr Stock is required to make a written and verbal public apology prior to the ordinary Council meeting to be held on 9 May 2018. There is no basis for you to make such a statement. At its highest there is a recommendation that Cr Stock be requested to make a written/verbal public apology for breaches of 2.2 and 2.9 of the Behavioural Code. That is not a mandatory requirement on any reading of the Report as handed down on 5 February 2018.

You suggest that a failure to comply with your direction may result in a further breach of the Code of Conduct for Council Members is without foundation and is in itself a matter that justifies Cr Stock making of [sic] a complaint of her own under the Code of Conduct against you which complaint will now be made.

11. Griffins Lawyers also sent a letter to the CEO of the council on 23 March 2018 which read, in part:

Our client will not be apologising either in writing or verbally to the Council. As to the two findings that have been made by EMA Legal our client accepts that whilst she does not agree that there has been a breach that is the decision of the independent body. Equally she demands that Cr Hoyle accepts and acknowledges that the version of facts that he put forward in the complaint which are so clearly refuted by leading members of the South Australian business community who were present and which lead to the rejection by EMA Legal of those complaints should be recorded in the Council minutes just as you have gone to great lengths to record the seeking of an apology from Cr Stock.

12. The Mayor and CEO responded to the letters from Griffins Lawyers by letters dated 9 April 2018 and both stated that 'both the Panel and the Council determined that an apology is warranted'. The CEO's letter further noted that '[t]he apology requested of Cr Stock is as a direct result of a finding of a breach of the Code'.

13. On 11 April 2018, Griffins Lawyers sent a further letter to the Mayor reading, in part:

You have again attempted to impose an obligation upon Cr Stock which you say entitles Council to take further action against her based upon your erroneous interpretation of the Code of Conduct. ...

So that there is no confusion going forward your reliance upon Clause 2.25 of the Code of Conduct is misconceived. Whilst there was an investigation under the Council's complaints handling process the mere passing of the resolution at the General Meeting held on 14 February 2018 that Councillor Stock be requested to make a written verbal public apology does not thereafter bind or compel Cr Stock to make that written and verbal public apology.

Clause 22.3.3 [sic] of the Code of Conduct is not mandatory in nature. That is to say the mere fact that Council may pass a resolution requesting that an Elected Member make a public apology, whether written or verbal, does not then lead to [sic] conclusion that you assert.

You have sought to rely on Clause 2.22 of the Code of Conduct to support your position. Clause 2.22 states as follows;

2.22 A failure of a council member to comply with a finding of an investigation under this Part, adopted by the Council, may be referred for investigation under Part 3.

It is simply impermissible for Council where its powers are restricted to requesting that an Elected Member make a public apology, whether written or verbal to elevate that to a mandatory obligation under the Part of the Code to compel that Elected Member to do so. Council has requested that Councillor Stock make a written and verbal apology and she has declined to do so. That is the end of the matter.

14. Cr Stock did not make an apology at the 11 April 2018 council meeting.
15. During the Ordinary Council Meeting on 11 April 2018, Cr Stock put forward a Question Without Notice about the actions taken by the complainant regarding the 'Code of Conduct for Council Members Complaint - Public' Agenda Item of the 14 February 2018 council meeting. The question was in the following terms:

By way of background, at the 14th February 2018 Council meeting you presented a misleading and selective report to Council in Item 21 of the Debate Agenda regarding a formal complaint made against me by Deputy Mayor Councillor Hoyle. The report failed to pay any regard to 9 serious allegations levelled at me by Deputy Mayor Hoyle that were found to be unsubstantiated. You wrote to me on the 22nd March and again on the 9th April pursuing a public apology from me which you have no such authority to do.

Your actions are nothing short of harassment, intimidation and bullying and this matter is now before the Ombudsman. Would you please explain to the Elected Body why you continue to act inappropriately and without authority.

16. In response to the Question Without Notice, the complainant wrote to Cr Stock and Griffins Lawyers by letters dated 17 April 2018. The letters noted:
 - allegations relating to behaviour of the nature mentioned in the Question Without Notice are captured within the provisions of the Code, which require a report finding a breach of the Code to be provided to a public meeting of the council
 - the council's Process for Managing Complaints and Breaches under the Code of Conduct for Elected Members requires confidentiality to be maintained where there is a finding of no breach
 - the Question Without Notice during a public council meeting, is a breach of the Code as follows:
 - 2.6 Comply with all Council policies, codes and resolutions
 - 3.3 Not release or divulge information that the Council has ordered to be kept confidential, or that the Council member should reasonably know is information that is confidential, including information that is considered by Council in confidence

- the Question Without Notice was improper and will not be answered, in accordance with regulation 9(6) of the *Local Government (Procedures at Meetings) Regulations 2013*.
17. Mayor Ray Agnew complained to my Office on 24 April 2018.
18. Cr Stock was advised of my investigation by letter dated 18 May 2018. On 6 June 2018 I received a response from Griffins Lawyers on behalf of Cr Stock. That letter confirmed that Cr Stock had not made an apology because there was no legal obligation upon her to do so. It further stated that '[t]he wording of the recommendations from the panel are unequivocal in this regard. Councillor Stock was always able to either apologise or not to apologise. She chose not to apologise. That with respect is the end of the matter.'

Relevant law

19. Section 63 of the *Local Government Act 1999* provides:

63 - Code of conduct for members

- (1) The Governor may, by regulation, prescribe a code of conduct to be observed by the members of all councils.
- (2) Council members must observe the code of conduct.

20. Clause 3.18 of Part 3 of the Code of Conduct provides:

A failure to comply with a finding of inappropriate behaviour (by the Council, independent investigator or Ombudsman) under Part 2 is also grounds for a complaint under this Part.

21. Part 2 of the Code of Conduct provides that council members must:

2.6 Comply with all Council policies, codes and resolutions.

...

2.10 Not bully or harass other Council members.

22. Clause 3.3 of the Code of Conduct provides that council members must:

Not release or divulge information that the Council has ordered be kept confidential, or that the Council member should reasonably know is information that is confidential, including information that is considered by Council in confidence.

23. Section 90 of the Local Government Act provides, in part:

- (2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).
- (3) The following information and matters are listed for the purposes of subsection (2):
 - (a) information the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead);
 - (b) information the disclosure of which—

- (i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and
 - (ii) would, on balance, be contrary to the public interest;
- (c) information the disclosure of which would reveal a trade secret;
- (d) commercial information of a confidential nature (not being a trade secret) the disclosure of which–
- (i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and
 - (ii) would, on balance, be contrary to the public interest;
- (e) matters affecting the security of the council, members or employees of the council, or council property, or the safety of any person;
- (f) information the disclosure of which could reasonably be expected to prejudice the maintenance of law, including by affecting (or potentially affecting) the prevention, detection or investigation of a criminal offence, or the right to a fair trial;
- (g) matters that must be considered in confidence in order to ensure that the council does not breach any law, order or direction of a court or tribunal constituted by law, any duty of confidence, or other legal obligation or duty;
- (h) legal advice;
- (i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council;
- (j) information the disclosure of which–
- (i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and
 - (ii) would, on balance, be contrary to the public interest;
- (k) tenders for the supply of goods, the provision of services or the carrying out of works;
- (m) information relating to a proposed amendment to a Development Plan under the *Development Act 1993* before a Development Plan Amendment proposal relating to the amendment is released for public consultation under that Act;
- (n) information relevant to the review of a determination of a council under the *Freedom of Information Act 1991*.

Whether Cr Stock failed to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code of Conduct for Council Members by failing to comply with a recommendation of the Local Government Association Governance Panel adopted by council on 14 February 2018

24. I consider that the panel qualifies as an independent investigator for the purpose of clause 3.18 of the Code of Conduct. I note that the panel made a finding of inappropriate behaviour against Cr Stock. I consider that Cr Stock has failed to comply with the panel's finding and recommendation as adopted by the council.

25. During the course of my investigation, Cr Stock was provided with an opportunity to explain whether she attempted to apologise and if not, to explain why.
26. Cr Stock's response to my investigation, via her lawyer, was that she did not apologise because there is no legal obligation on her to do so. It was claimed that the wording of the panel's recommendations were unequivocal in regards to there being no legal obligation to apologise.
27. While I acknowledge that the panel's recommendation states that 'Cr Stock *be requested* to make a written/verbal public apology' (emphasis added), I consider that Cr Stock's argument is one of semantics and that it was clearly intended by the panel that Cr Stock apologise for the breaches of the Code of Conduct that were found to be substantiated in the EMA report.
28. I further consider that, in resolving to adopt the panel's recommendation, the council also intended that Cr Stock apologise. I note that clause 2.6 of the Code of Conduct requires council members to comply with all council resolutions. It is my view that Cr Stock should have interpreted the council's resolution as requiring her to apologise. It is unfortunate that this was not Cr Stock's interpretation.
29. I consider it reasonable to construe the Code of Conduct as intending that any breach of it that is substantiated through the proper processes will result in consequences for the council member who is found to have committed the breach. By Cr Stock's interpretation, a council member can be found to have breached the Code of Conduct and not be required to take any action to make amends. I do not consider that this was intended by the Code of Conduct.
30. I am of the view that, even if Cr Stock does not agree with the findings in the EMA report and does not believe she is legally obliged to make an apology, refusing to apologise is unnecessarily obstructive, shows a disregard for the principles underpinning the Code of Conduct and potentially undermines community confidence and trust in local government.
31. I am of the view that Cr Stock's failure to comply with the recommendation of the panel that she apologise, as adopted by the council on 14 February 2018, amounts to a failure to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code of Conduct. A failure to observe the Code of Conduct is also a breach under section 63 of the Local Government Act.

Opinion

In light of the above, I consider that Cr Stock has failed to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code of Conduct and section 63 of the Local Government Act 1999. In this way, Cr Stock acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

Whether Cr Stock breached clause 3.3 of Part 3 of the Code of Conduct for Council Members by raising a Question Without Notice regarding an allegation of 'harassment, intimidation and bullying' and a complaint to the Ombudsman thereby divulging confidential information

32. Clause 3.3 of the Code of Conduct prohibits a council member from releasing or divulging information that is the subject of a confidentiality order by the council or that the council member should reasonably know is confidential.

33. The complainant has not alleged that there was a confidentiality order over the matters raised in the Question Without Notice and I have no evidence that such an order had been made. Therefore, the issue is whether the Question Without Notice raised matters that Cr Stock should reasonably have known to be confidential.
34. In relation to the part of the Question Without Notice that alleges 'harassment, intimidation and bullying' by the complainant, the complainant submits that this should have been dealt with in accordance with the council's *Process for Managing Complaints and Breaches under the Code of Conduct for Elected Members (the Process)* because the allegations relate to a breach of the Code of Conduct.
35. Clause 2.10 of the Code of Conduct states that council members must '[n]ot bully or harass other Council members'. Therefore the allegation raised in the Question Without Notice does relate to a breach of Part 2 of the Code of Conduct. Given this, the appropriate course of action would have been for Cr Stock to make a complaint about the alleged harassment, intimidation and bullying in accordance with the Process.
36. The complainant states that the Process requires that a report be prepared and confidentiality be maintained where there is a finding of no breach.
37. In relation to confidentiality, the Process states that criminal or illegal behaviour, such as corruption, fraud and theft, 'must be kept confidential until fully investigated and finally determined'. The allegations made by Cr Stock do not relate to such criminal or illegal behaviour.
38. The Process also states that the findings of the investigation into the complaint and the complaint details '[m]ay be received by Council in confidence providing that the allegations meet the special circumstances set out under Section 90(3) of the Local Government Act 1999'. It does not appear that the allegations satisfy any of the special circumstances set out in section 90(3).
39. I note that it is unusual that the Process does not require confidentiality in relation to a non-criminal matter until a breach is found to be substantiated. The council may wish to amend the Process to take into account this gap and clarify the position.
40. Given the above, I do not consider that the allegation of harassment, intimidation and bullying was confidential information and, therefore, I do not consider that Cr Stock should reasonably have known that it was confidential. Despite this, I note that it would have been prudent for Cr Stock to have exercised greater discretion.
41. In relation to the part of the Question Without Notice that states 'this matter is now before the Ombudsman', the fact that a complaint has been made to the Ombudsman is not confidential information. It is not an offence under the Ombudsman Act to disclose that a complaint has been made to the Ombudsman.
42. Given the above, I do not consider that the information that a complaint had been made to the Ombudsman about the allegation of harassment, intimidation and bullying was confidential information and therefore I do not consider that Cr Stock should reasonably have known that it was confidential.

Opinion

In light of the above, I consider that Cr Stock did not breach the provisions of section 63 of the Local Government Act and clause 3.3 of Part 3 of the Code of Conduct, and did not act in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.

Summary and Recommendation

In light of the above, I consider that:

- Cr Stock has failed to comply with a finding of inappropriate behaviour for the purposes of clause 3.18 of Part 3 of the Code of Conduct and section 63 of the Local Government Act 1999. In this way, Cr Stock acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act
- Cr Stock did not breach the provisions of section 63 of the Local Government Act and clause 3.3 of Part 3 of the Code of Conduct by raising the Question on Notice, and did not act in a manner that was unlawful within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy the error, I recommend under section 25(2) of the Ombudsman Act that the council reprimand Cr Stock for her refusal to apologise in accordance with the resolution of Agenda Item 21.1 at the council meeting on 14 February 2018.

Final comment

I now report Cr Stock's breach of duty to the principal officer of the council, as required by section 18(5) of the Ombudsman Act.

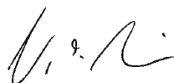
In accordance with Part 3 of the Code of Conduct for Council Members, this report must be provided to a public meeting of the council within two ordinary meetings of the council receiving my report.

In accordance with section 25(4) of the Ombudsman Act, I request that the council report to me by 30 September 2018 on what steps have been taken to give effect to my recommendation/s above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to me.

I have also sent a copy of my report to the Minister for Local Government as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

3 August 2018